



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4, 1.7 with its Comment [34], and 1.13 with its Comment [9]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 01-07
April 2002**

TOPIC: Conflicts of Interest

DIGEST: Two lawyers in the same law firm may continue to represent two different governmental units at the same time where the agencies interest are potentially in conflict, but there is no current direct adversity between the clients. Under traditional methods for separating organizational entities, the units of government are separate clients for conflicts of interest purposes; the units function under separate boards, a different set of rules, and the representation of one entity is not of significant importance to the other entity. Depending on the foreseeability of future conflicts, however, the lawyer may have a duty to inform their clients of the limitations that would be placed on their representation of each unit should an actual conflict develop.

REF.: Illinois Rules of Professional Conduct, Rules 1.4 and 1.7(a) and (b)

ABA Formal Ethics Opinion No. 97-405

FACTS

A city of 3800 residents ("City") employs Partner A as the City Attorney on a part-time basis. Partner B of the same law firm is then appointed a part-time attorney for Park District, which is located within City. City and Park District are governed by different Boards and separate rules. Furthermore, City and Park District have no history of direct conflicts with one another. Nonetheless, the issue has been raised as to whether having two attorneys from the same law firm represent City and Park District creates a conflict of interest. Partners A and B have taken the position that if an actual conflict does arise, either City or Park District can employ separate counsel to handle the issue.

QUESTION

Is there a conflict of interest when two attorneys from the same law firm represent two units of local government who function under separate boards and different rules and who are not currently adverse on any issues?

OPINION

Partners A and B, of course, cannot take adverse positions to one another on behalf of the same client. Thus, as an initial matter, Partners A and B must determine whether or not City and Park District may be considered separate clients for conflicts of interest purposes. ABA Formal Ethics Opinion 97-405 provides advice on when two related government entities may be considered separate for conflicts purposes. The opinion handles the issue under the same analysis used for corporate affiliates and other organizational entities. Specifically, in the absence of an express agreement between the organizational client and the lawyer as to the identity of the client, ABA Opinion 97-405 states that the identity of the client may be inferred from certain factors: whether or not each government entity has independent legal authority to act on the matter in question, and whether representation of one government entity has any importance to the other government entity. The opinion also considered whether or not decision makers within the government agencies with whom the lawyers would be working were one and the same.

In the case at hand, City and Park District are government by separate board and function under separate rules and statutory authority. We therefore assume that legal matters for the City and Park District are supervised by separate individuals. Furthermore, there is no indication that the representation of the City is of general importance to the Park District and vice versa. Assuming that the City and Park District are also separately funded, we may consider the City and Park District to be separate clients for conflicts of interest purposes.

The next step is to determine whether or not representation of both City and Park District by members of the same firm creates a conflict of interest. The provisions regarding conflicts of interest between current clients are covered in Rules 1.7(a) and (b):

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after disclosure.

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after disclosure.

Rule 1.7 (a) prohibits an attorney from representing one client if the representation would be "directly adverse" to another client, absent disclosure and consent. In this case, there is no direct adversity between City and Park District. The mere possibility that City and Park District may have a dispute in the future does not give rise to a Rule 1.7(a) conflict.

Rule 1.7(b) prohibits an attorney from representing a client if that representation would be "materially limited" by the attorney's responsibilities to another client, a third party (such as one's own law partner), or by the attorney's own interests. Because City and Park District are not directly adverse to one another on any matter at the present time, it does not appear that Partner A or B would be materially limited by their respective clients' interests, the interests of any other party, or their own interests. Of course, if the interests of City and Park District became directly adverse, then both Partners A and B would have to disclose the conflict to their clients and obtain their consent or withdraw from representation of both clients.

In addition, to the extent that either Partner A or Partner B foresee a conflict between City and Park District in the future, the attorneys may have an obligation to inform their respective clients of the potential conflict and its potential limitations on the attorneys' ability to represent their clients under Rule 1.4(b). Rule 1.4(b) requires an attorney to explain a matter to the client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Thus, assuming that a conflict between City and Park District were imminent, Partners A and B would be required to inform both clients that they would have to seek other legal counsel if either clients refused to waive the conflict or if the conflict were unwaivable.

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